CLIENT UPDATE – COMPANIES (AMENDMENT) BILL 2017

(Corporate Law S/No. 1701 – 29 March 2017)

On 10 March 2017, Parliament passed the Companies (Amendment) Bill (the "**Bill**") updating the Companies Act (Cap. 50) (the "**Act**") to address the findings of the Financial Action Task Force, simplify compliance requirements for companies, permit the transfer of registration of foreign companies as Singapore companies, and amend the corporate restructuring regime in Singapore[1].

The following is a summary of the key material changes to the Act as set out in the Bill. We have classified the changes under 10 sections, grouped under 3 headings:

(a) Compliance Changes (*Sections 1 to 6*);

(b) Inward Re-Domiciliation Regime (*Section 7*); and

(c) Corporate Restructuring and Insolvency Changes (*Sections 8 to 10*).

Changes to the Act will come into force in phases on their "**Effective Date**" announced by ACRA[2]. The Effective Dates stated herein are based on the latest information provided by ACRA, and may be subject to change.

COMPLIANCE CHANGES

1. COMMON SEAL NO LONGER REQUIRED

Current Provisions

Each company is required to have a common seal. The common seal is used for the company to execute deeds, and is also required to be affixed to share certificates.

Amended Provisions

A company will no longer be required to have a common seal. A company may however still have or retain its common seal if it desires.

(s.41A)

A company may execute a deed or any document requiring the affixation of its common seal (including a share certificate) by having the document signed on behalf of the company by:

(a) 2 directors of the company;

(b) A director and a secretary of the company; or

(c) A director of the company in the presence of a witness who attests his signature.

(s.41B)

Any document required to be executed under the common seal by any written law will be satisfied if the document is executed in the aforesaid manner.

(s.41C)

Comments

Company constitutions commonly still require to company to have a common seal. A company which wishes to do away with its common seal entirely would have to amend its constitution accordingly. However, this does not prevent a company with a common seal from taking advantage of the amended provisions, unless restricted by its constitution.

Documents from foreign jurisdictions may still contain requirements for execution under seal. In such a case, it may (from a practical perspective) be more convenient for a company to use a common seal to execute such documents.

If the document to be signed is a deed, the document must contain clear language to that effect. In particular, the portion of the deed where the signatures are affixed should state that it is being signed / executed as a deed.

Effective Date

31 March 2017.

[1] https://www.mlaw.gov.sg/content/dam/minlaw/corp/News/CAB.pdf, retrieved on 29 March 2017

[2] https://www.acra.gov.sg/CA_2017/, retrieved on 29 March 2017

2. REGISTRATION OF FINANCIAL YEARS

Current Provisions

Financial years have no legal status or use under the Act, although companies register their financial years with ACRA when submitting an annual report.

Amended Provisions

Each company will have a financial year, and the timeframe for holding an AGM will be determined with reference from the end of a company's financial year.

(s.198)

The rules governing the determination of a company's financial year are broadly as follows:

(a) By default:

(i) a company incorporated after the effective date of the changes to the Act will have its first financial year commence on the date of its incorporation and end on the day declared as the last day of the first financial year, and each subsequent financial year will end 12 months after the date of the end of the previous financial year.

(s.198(1)(a) and (b))

(ii) A currently existing company which previously submitted an annual return to ACRA will have its financial year end 12 months after the date of the financial year declared in the last annual return, and each subsequent financial year will end 12 months after the date of the end of the previous financial year.

(s.198(3)(a)(i))

(iii) A currently existing company which has never submitted an annual return to ACRA will have its financial year end 12 months after its date of incorporation. and each subsequent financial year will end 12 months after the date of the end of the previous financial year.

(s.198(3)(a)(ii))

(b) The first financial year of a company cannot end more than 18 months from the date of incorporation without the Registrar's approval.

(s.198(2))

(c) Each subsequent financial year of a company cannot end more than 18 months from the end of the previous financial year without the Registrar's approval.

(s.198(5)(a))

(d) A financial year does not have to be a year long.

(s.4(1))

(e) The financial year of a private company cannot be changed after 5 months from the end of such financial year.

(s.198(6)(c), s.203(1)(b))

Different timelines may apply to different types of companies.

Comments

This amendment is largely only administrative in nature. We do not anticipate that companies will have to change their business practises to comply with this as in practice, companies usually have their financial years aligned to their reporting deadlines. The statutory alignment is nevertheless welcome for bringing the law into line with business practice.

Effective Date

Estimated early 2018.

3. PRIVATE COMPANIES AUTOMATICALLY EXEMPTED FROM HOLDING AGMS

Current Provisions

A private company must hold an AGM once a year, within 15 months of the date of the previous AGM, and lay the accounts of the company made up to a date not more than 6 months old before the members of the company at such AGM.

Amended Provisions

A private company is automatically exempted from the requirement to hold an AGM each year, in accordance with the following provisions:

(a) The company must send each member a copy of the financial statements (or consolidated financial statements if the company has any subsidiaries) within 5 months of the end of the financial year to which such statements relate.

(s.175A(1)(b))

(b) Any member or auditor of the company may require an AGM to be held by giving notice to the company within 14 days of the date of the financial statements.

(s.203(4A))

(c) If such a notice is received, the company must then hold an AGM within 6 months of the end of the financial year to which such financial statements relate.

(s.175(1)(b))

(d) If no such notice is received, the company may proceed to file the annual returns without holding the AGM.

(s.175A(1)(b))

A private company is required to file its annual returns to ACRA within 7 months of the end of its financial year. Other types of companies may be required to file their annual returns at different times.

(s.197(1) and (1A))

Comments

Even if an AGM is not held, a company must still pass the ordinary resolutions required for the reappointment of auditors, reappointment of directors (if necessary), approving the remuneration of directors, and other ordinary business. This may be done by written means under s.184A to s.184F.

Effective Date

Estimated early 2018.

4. REGISTER OF MEMBERS OF FOREIGN COMPANIES

Current Provisions

Foreign companies registered in Singapore are required to keep a branch register for members of the company resident in Singapore who apply to have their shares registered therein.

Amended Provisions

Foreign companies registered in Singapore must keep a register of its members in Singapore, and notify ACRA as to the location where the register of members in Singapore is kept.

(s.379(1) and (2))

The register of members must contain the following particulars of each member:

(a) such person's name and address;

(b) the date on which such person became a member;

(c) the date on which any person who ceased to be a member in the last 7 years ceased to be a member;

(d) a statement of the shares held by each member and the particulars of such shares, including the date of allotments of shares to members and the number of shares then allotted;

(e) in the case of a company with more than 50 members must also keep an index in convenient form of the name of its members; and

(f) other particulars prescribed from time to time.

(s.380)

Comments

While this increases the regulatory compliance for foreign companies, it is perhaps inevitable given the current geopolitical climate and need to ensure that Singapore's reputation as a financial hub is not misused to fund terrorism or launder funds.

Effective Date

31 March 2017.

5. REGISTER OF CONTROLLERS

Current Provisions

Companies are only required to keep registers of members, which since the 2014 amendments to the Act have (for private companies) been kept by the Registrar in electronic form.

Amended Provisions

Each non-listed company (including foreign companies registered in Singapore) which is not a Singapore financial institution wholly owned by the government or a statutory board is required to maintain a register of the controllers of the company stating certain prescribed particulars of each controller

(s.386AA(1), s.386AF(1) to (6))

A controller is defined as a person who, directly or indirectly:

(a) holds the right to remove or appoint the directors who hold the majority of voting rights at meetings of the directors;

(b) holds more than 25% of the total rights to vote at a members' meeting;

(c) has the right to exercise significant influence or control over the company;

(d) has an interest in more than 25% of the shares of the company; or

(e) has an interest in shares with more than 25% of the total voting power of the company (excluding treasury shares).

(s.386AB)

If the company does not receive the particulars of any controller, it must enter or update the particulars in the register with a note to that effect.

(s.386AF(9)(b))

The register must be in place no later than 30 days after incorporation, or if the company was incorporated before the amendments came into force, 60 days from the date of the amendments coming into force.

(s.386AF(1) and (2))

A controller need not be registered if his entire significant interest or significant control in the company is through another entity which he is a controller of, and which is:

(a) required to keep a register of controllers;

(b) exempted from keeping a register of controllers; or

(c) a trustee of an express trust under Part VII of the Trustees Act.[3]

(s.386AC)

The company and each controller are under a duty to keep the information in the register complete, updated, and accurate.

(s.386AG to s.386AK)

The registrar or an ACRA officer may require a company to produce its register for inspection and make inquiries regarding the register. However, the company is statutorily restricted from disclosing the contents of the register to, or make it available for inspection by, any member of the public (which includes a member of that company acting in his capacity as a member).

(s.386AM, s.386AF(11))

The amendments also empower the minister to direct the registrar to maintain a central register of controllers, in which case each company must lodge its register of controllers with the central register and keep the central register updated. The registrar is statutorily restricted from disclosing the contents of the central register to, or make it available for inspection by, any member of the public (which includes a member of that company acting in his capacity as a member).

(s.386AN)

Comments

This amendment is largely administrative in nature. Controllers will not be put under any additional duty vis the company save for the duty to notify the company of its particulars and keep such particulars updated. The register of controllers will be kept confidential and disclosed only to the authorities.

[3] Part VII of the Trustees Act is a new part introduced in the Trustees (Amendment) Bill 2017 which empowers the minister to require the trustee(s) of certain express trusts to maintain records on persons related to the trust.

Company secretaries and directors must however clearly understand the factors which define a controller, to allow the company to maintain accurate registers.

These new requirements are broadly in line with the existing practice for companies registered in the British Virgin Islands.

While this increases the regulatory compliance for companies, it is perhaps inevitable given the current geopolitical climate and need to ensure that Singapore's reputation as a financial hub is not misused to fund terrorism or launder funds.

Effective Date

31 March 2017.

6. REGISTER OF NOMINEE DIRECTORS

Current Provisions

Companies are only required to keep registers of directors, which since the 2014 amendments to the Act have (for private companies) been kept by the Registrar in electronic form.

Amended Provisions

Each company is required to maintain a register of the nominee directors of the company.

(s.386AL(4))

A nominee director is a director who is accustomed or under an obligation to act in accordance with the directions, instructions, or wishes of any other person.

(s.386AL(8))

Each nominee director must inform the company of the fact, and provide prescribed particulars of such nominee director's principal, within 30 days after incorporation or the date on which such director becomes a nominee, or if the company was incorporated before the amendments came into force, 60 days from the date of the amendments coming into force. He must also inform the company of his ceasing to be a nominee or any change of particulars of his principal within 30 days.

(s.386AL(1) to (3))

The registrar or an ACRA officer may require a company to produce its register for inspection and make inquiries regarding the register. However, the company is statutorily restricted from disclosing the contents of the register to, or make it available for inspection by, any member of the public (which includes a member of that company acting in his capacity as a member).

(s.386AM, s.386AL(5))

Comments

This amendment is largely administrative in nature. Nominee directors are not subject to any further duty (save for the duty to disclose that he is a nominee director and the identity of the principal), and are also not exempted from his duties and responsibilities as a director. Principals are not subjected to additional duties, although principals are likely to be considered shadow directors and hence already be subject to duties under the existing Act. The register of nominee directors will be kept confidential and disclosed only to the authorities.

While this increases the regulatory compliance for companies, it is perhaps inevitable given the current geopolitical climate and need to ensure that Singapore's reputation as a financial hub is not misused to fund terrorism or launder funds.

Effective Date

31 March 2017.

INWARD RE-DOMICILIATION REGIME

7. TRANSFER OF REGISTRATION OF FOREIGN COMPANIES AS SINGAPORE COMPANIES

Current Provisions

While foreign companies may register a branch in Singapore, such foreign companies are still considered to be subject to the jurisdiction of their country of original registration. There is no provision permitting them to be re-domiciled as a Singapore company.

Amended Provisions

Foreign companies may now apply to have their registration as a company in their original jurisdiction transferred to Singapore, and to continue their existence as a Singapore company limited by shares. The foreign company may do so by submitting an application to ACRA with the prescribed information and payment of a prescribed fee.

(s.358)

Upon approval of the re-registration, ACRA will issue a notice of transfer of registration, and the company will be deemed to be registered in Singapore with effect from the date of the notice.

(s.359(3), s.361(a))

The foreign company must thereafter:

(a) within 30 days of the date of the notice register all pre-existing charges with ACRA;

(s.363)

(b) within 60 days of the date of the notice submit proof to ACRA that it has been de-registered in its previous place of registration; and

(s.359(6))

(c) within 60 days of the date of the notice complete and have ready for delivery new share or debenture certificates for shares or debentures existing at the date of the notice.

(s.364)

Re-registration of a foreign company does not:

(a) create a new legal entity;

(b) prejudice or affect the identity of the company;

(c) affect the property, rights, or obligations of the company; or

(d) render defective any legal proceeding by or against the foreign corporate entity.

(s.361(2))

Comments

This innovative amendment allows foreign companies to "emigrate" from their original jurisdiction and "re-settle" in Singapore, without needing to go through tedious incorporation, transfer, assignment and/or novation processes

This is a welcome amendment that will encourage foreign business entities looking to take advantage of (amongst other things) Singapore's tax regime and strong international position to re-locate their headquarters and holding companies to Singapore.

Effective Date

First half of 2017.

CORPORATE RESTRUCTURING AND INSOLVENCY CHANGES

8. RULES FOR SCHEMES OF ARRANGEMENT

Current Provisions

A company applying for a scheme of arrangement (an "**Applicant**") largely has to look to caselaw[4] for guidance on the specific powers a court could exercise in support of a scheme of arrangement, the rules governing a scheme meeting, and the procedure thereafter. The rights of a creditor to intervene in the court at various stages was also not clearly set out.

Amended Provisions

The Act will provide detailed guidance on the legal process to convene a scheme of arrangement. The court will also receive additional powers, including the power to "fast-track" approval of a scheme and cram down on a dissenting class.

In summary, in addition to the currently existing provisions in s.210 to s.212:

(a) An Applicant may first apply to Court to make restraining orders in support of its application, even before filing its application under s.210. The application for restraining orders must be sent to

[4] E.g. ***The Royal Bank of Scotland NV (formerly known as ABN Amro BV) and others v TT International Ltd and another appeal*** [2012] 2 SLR 213; ***Re Punj Lloyd Pte Ltd and another matter*** [2015] SGHC 321; ***Re Conchubar Aromatics Ltd and other matters*** [2015] SGHC 322

each creditor meant to be bound by the compromise (unless the court orders otherwise), and the creditors may apply to discharge, vary, or be exempted from such order.

(s.211B)

(b) The court may make restraining orders in support of the Applicant's related companies.

(s.211C)

(c) A creditor may apply to the court to restrain the Applicant from disposing its property (other than in good faith and in the ordinary course of business), transferring its shares, or altering the rights of any member of the Applicant.

(s.211D)

(d) The Applicant may apply to the court for the debt owed to a rescue financer to be treated in such a manner that in the event the scheme of arrangement fails and the Applicant is wound up, the rescue financer's debt will obtain priority over all other unsecured debts of the Applicant.

(s.211E)

(e) The Applicant must state in its application under s.210 the manner in which a creditor is to file its proof of debt, and the period in which the proof is meant to be filed. If a creditor disputes an adjudication, the creditor's debt may be adjudicated by an independent assessor appointed by consent or by the court. If any party disagrees with the assessment of the assessor, it may refer it to the court, which will consider the dispute at the court application to approve the scheme of arrangement under s.210(4).

(s.211F)

(f) At the s.210(4) hearing, the court may order a re-vote to approve the scheme of arrangement, and may give further directions in respect of such re-vote.

(s.211G)

(g) If there are 2 or more classes of creditors and a dissenting class does not approve the scheme, the court may cram down on the dissenting class if (i) a majority in number of all affected creditors holding not less than three-fourths of the value of the total debt owed to all affected creditors (across classes) approve the scheme, and (ii) it is fair and equitable to do so. The Act will also provide criteria for the courts to assess in determining whether a cram down would be fair and equitable, which among other things requires that no creditor in the dissenting class will receive an amount lower than what such creditor is estimated by the court to receive in the most likely alternative scenario to the approval of the scheme of arrangement.

(s.211H)

(h) The court may approve a compromise without the need for a creditors' meeting if, among other things, the court is satisfied that had such a meeting been held, the conditions required to approve a scheme of arrangement would have been met.

(s.211I)

(i) On the application of an interested party, the court has the power to review any act, omission, or decision taken by the Applicant after the scheme of arrangement has been approved, reverse or modify such decision, give any direction to rectify a non-compliant act, omission, or decision, or clarify any term of the scheme of arrangement.

(s.211J)

Comments

It appears that the amendments are largely meant to codify, clarify, and supplement, but not amend, the previous position and process established by caselaw.

The powers of the court to cram down on a dissenting class (under s.211H) are new and will help ensure that a dissenting class does not hold a scheme of arrangement hostage. We look forward to observing how the courts will apply and implement a cram down after the relevant provisions come into force.

The priority in payment for rescue financers is also new and will be welcomed by rescue financers, who are likely to be more comfortable assisting distressed companies due to the greater protection their debts may obtain against unsecured creditors.

Effective Date

Not announced.

9. RULES GOVERNING JUDICIAL MANAGEMENT (Art 5)

Amended Provisions

The judicial manager may apply to the court for the debt owed to a rescue financer to be treated in such a manner that in the event the scheme of arrangement fails and the applicant is wound up, the rescue financer's debt will obtain priority over all other unsecured debts of the applicant.

(s.227HA)

The newly-enacted provisions for schemes of arrangement have been made applicable to companies undergoing judicial management, with the necessary modifications.

(s.227X)

Comments

The priority in payment for rescue financers is new and will be welcomed by rescue financers, who are likely to be more comfortable assisting distressed companies due to the greater protection for their contributions.

Effective Date

Not announced.

10. UNCITRAL MODEL LAW ON CROSS-BORDER INSOLVENCY

Amended Provisions

The UNCITRAL Model Law adopted by the United Nations Commission on International Trade Law on 30 May 1997 is given force of law in Singapore. This model law provides effective mechanisms for dealing with cases of cross-border insolvency, i.e. when a company undergoing insolvency proceedings in a jurisdiction has assets or creditors in other jurisdictions.

(s.354B)

The key commercial provisions under the Model Law are briefly set out below:

(a) A liquidator, judicial manager, or scheme manager of a Singapore company is authorised to act on behalf of the company in foreign jurisdictions.

(b) A foreign representative is authorised to apply directly to the court in Singapore, including to commence and/or participate in proceedings under Singapore insolvency law, and to restrain a debtor from taking acts detrimental to creditors.

(Art 9, Art 11 to 14, Art 23)

(c) Foreign insolvency proceedings may be recognised by the Singapore court, and consequent relief in support of such foreign insolvency proceedings may be given by the Singapore courts including staying actions against the debtor and execution against the debtor's property.

(Art 15, Art 19, Art 21)

Consequent to the enactment of the UNCITRAL Model Law, the ring-fencing of assets in Singapore of a foreign company undergoing liquidation has been largely abolished. The liquidator for a foreign company appointed for Singapore must realise the assets and generally pay it to the foreign liquidator, unless it is a relevant company (as defined in the Act), in which case the Singapore liquidator must first satisfy debts incurred in Singapore before making payment to the foreign liquidator.

(s.377(3)(c), s.377(14))

Comments

The introduction of the UNCITRAL Model Law reflects Singapore's push to promote itself as a global business centre. It streamlines the recovery processes for foreign creditors and liquidators. However, Singapore creditors may be somewhat disadvantaged as local assets of a foreign company are no longer ring-fenced to give the Singapore creditors priority to satisfy their debts from such assets.

It is hoped that as more jurisdictions adopt the UNCITRAL Model Law, Singapore creditors will in future enjoy greater protection and ease of recovery from distressed foreign business entities undergoing insolvency proceedings in a foreign jurisdiction.

Effective Date

Not announced.

CONTACT DETAILS

This client update has been prepared by the following solicitor(s).
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